Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—v.—

ANDRE MARTINEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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March 21, 1994

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QUESTION PRESENTED

Whether it can be determined -- under the rationales of this Court's decisions in *United States v. Griffin*, __U.S__, 112 S.Ct. 466 (1991), and those cases that held that an erroneous *Sandstrom* charge can be harmless -- that the jury did not rely on the erroneously charged statutory New York permissive "drug factory" presumption when there was some, but insufficient, evidence to support the verdict on that basis?

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In the

Supreme Court of the United States

October Term, 1993

No. __-____

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

ANDRE MARTINEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PRELIMINARY STATEMENT

Petitioner, the People of the State of New York, requests that this Court issue a writ of certiorari to review the December 21, 1993, decision and order of the New York Court of Appeals ("Court of Appeals") entered in the above-entitled state court proceeding. By that decision and order,

the Court of Appeals reversed respondent Andre Martinez's ("defendant") conviction for Criminal Possession of a Controlled Substance in the Third Degree and Criminal Sale of a Controlled Substance in the Third Degree (New York Penal Law §§ 220.16[1], 220.39[1] [McKinney 1989]) and ordered a new trial.

The Court of Appeals reversed defendant's conviction on the ground that the trial court erroneously charged the New York statutory "drug factory" presumption and that it could not be conclusively known whether the jury's general verdict was based on the presumption or on a lawful constructive possession charge. The Court of Appeals reached this conclusion, in part, because there was some, albeit insufficient, evidence to support a verdict based on the presumption.

JURISDICTION

This Court has jurisdiction to review the December 21, 1993, decision and order of the Court of Appeals, the New York State court of last resort. Sup. Ct. R. 10.1.(b). That decision and order addressed the federal question of whether -- under this Court's reasoning in *United States v. Griffin*, __U.S.__, 112 S.Ct. 466 (1991) -- a general verdict can stand when the jury was erroneously charged as to a permissive statutory presumption which, if relied upon by the jury, would have allowed the jury to infer the existence of several elements of the charged crime on the basis of

insufficient evidence. *See In re Winship*, 397 U.S. 358, 364 (1970). The error in charging the presumption was thus of constitutional magnitude, given that there was no rational way that the jury could make the connection between the facts adduced at trial and the ultimate facts which the presumption permitted the jury to infer. *See County Court of Ulster County v. Allen*, 442 U.S. 140 (1979); *Leary v. United States*, 395 U.S. 6 (1969). This Court can review the question of whether such errors require *per se* reversal. *Chapman v. California*, 386 U.S. 18, 19 (1967).

Although the decision and order of the Court of Appeals cited and discussed various state precedents in addition to the federal precedents, it did not contain a plain statement that it rested on a state ground; rather, a review of the decision establishes that it rested primarily upon federal law and not upon an independent and adequate state ground. *See Michigan v. Long*, 463 U.S. 1032, 1042-1043 (1983); *New York v. Class*, 475 U.S. 106, 109-110 (1986).

This petition for a writ of certiorari is filed within ninety days of the date decision and order of the Court of Appeals and is thus timely. Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

New York's statutory "drug factory" presumption provides, in pertinent part:

> The presence of a narcotic drug, narcotic preparation . . . in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found.

New York Penal Law § 220.25(2) (McKinney 1989).

The Sixth and Fourteenth Amendments to the Constitution of the United States respectively provide, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury.

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Under these constitutional provisions, a defendant has a right to a fair trial and to have the prosecution prove every

element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364; *County Court of Ulster County v. Allen*, 492 U.S. at 156.

STATEMENT OF THE CASE

Factual Background

Prior to executing a search warrant, police officers assigned to a tactical narcotics force team made three separate purchases of cocaine at an apartment in Queens County, New York. First, on September 13, 1988, co-defendant Alphonse Mejie, assisted by co-defendant Julia Pelta, sold an eighth of an ounce of cocaine to an undercover police officer in the apartment. Second, on September 20, 1988, defendant sold another eighth of an ounce of cocaine to a different undercover officer in the apartment. Finally, on September 29, 1988, prior to execution of the warrant, the same undercover officer who had purchased cocaine from defendant on September 20 purchased another eighth of an ounce of cocaine from defendant in the apartment.

Immediately following this final sale of cocaine by defendant, the police, armed with a "no-knock" warrant which they had previously obtained, forcibly entered the apartment. During the ensuing search, they recovered a tinfoil packet containing an eighth of an ounce of cocaine on the living room floor in a four-to-five-inch space between a wall and a couch. In addition, the police found a one-dollar

bill and a five-dollar bill containing small amounts of cocaine in a closet. Also recovered by the police from various closets was $4,590 in cash, some of which included the pre-recorded "buy money" used to purchase cocaine from defendant immediately prior to the entry pursuant to the search warrant. The police arrested defendant and three other adults, including co-defendants Mejie and Pelta, who were also in the apartment when the police entered it.

Defendant was thereafter charged with two counts of Criminal Sale of a Controlled Substance in the Third Degree (New York Penal Law § 220.39[1] [McKinney 1989]), for each of his sales to the undercover officer, and one count of Criminal Possession of a Controlled Substance in the Third Degree (New York Penal Law § 220.16[1] [McKinney 1989]), for possession of the cocaine found in the apartment during execution of the search warrant (Queens County Indictment Number N11944/88). Defendant proceeded to a joint trial with co-defendant Alphonse Mejie.

The Trial Proceedings

At trial, in instructing the jury on the Criminal Possession of a Controlled Substance count, the court charged the jury that it could consider, in the alternative, whether defendant constructively possessed the cocaine or whether defendant knowingly possessed it pursuant to New York's statutory "drug factory" presumption. Pursuant to that presumption and charge, the jury was permitted to infer

knowing possession only if it first found that the substance was in "open view" in a private room "under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare [the controlled substance] for sale," and that defendant was "in close proximity" to the controlled substance when it was found.[1] Pet. App. 31a.

Although not specified in the statute authorizing the presumption, the court also instructed the jury that "close proximity" need not mean the same room in which the controlled substance was recovered, but could also mean an adjacent room, or a room from where the substance could be observed. In addition, to be in "open view," the narcotics themselves did not necessarily have to be displayed; the court instructed that it was sufficient if the narcotics were found in a container or package and there was other evidence of the preparation of narcotics for sale. Pet. App. 31a.

Immediately following the court's charge, defendant objected to the delivery of the "drug factory" presumption charge, and argued that the court had improperly expanded the presumption beyond the statutory terms, thereby denying defendant a fair trial.

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[1]The statutory presumption is authorized by New York Penal Law § 220.25(2) (McKinney 1989), the terms of which are set forth *supra*, at p. 3-4. The pertinent part of the court's charge is reproduced in the appendix to this petition at pp. 30a-34a, *infra*.

Defendant was convicted by the jury of the two narcotics sale counts and the narcotics possession count. He was sentenced, as a second felony offender, to an indeterminate prison term of from six to twelve years on April 9, 1990.

The Appellate Proceedings

Defendant thereafter appealed to the New York Supreme Court Appellate Division, Second Department, and argued that he was denied his federal constitutional rights to due process and to a fair trial under the Fourteenth Amendment, because the instruction "should not have been given and was incorrect, as given" and, as such, "allowed the jury to draw an improper inference." The Appellate Division unanimously affirmed defendant's judgment of conviction on September 14, 1992.[2] The Appellate Division held that, although it was error for the trial court to charge the jury that it could rely on the New York "drug factory" presumption to aid in finding defendant guilty of the possession charge, the error was harmless beyond a reasonable doubt because "no view of the evidence supported this charge," and there was overwhelming evidence of defendant's constructive possession of the narcotics without the aid of the presumption. *People v. Martinez*, 186 A.D.2d

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[2]The Decision and Order of the Appellate Division is reproduced in the appendix to this petition at pp. 25a-29a, *infra*.

151, 152-153, 587 N.Y.S.2d 712, 714 (2d Dept. 1992), Pet. App. 28a.

On appeal to the Court of Appeals, defendant again argued that the presumption was "inapplicable" and "inaccurately elucidated" and that the "guilty verdict predicated upon an unlawful theory of guilty denied [him] due process required by the Fourteenth Amendment to the United States Constitution." In a 4-3 decision, the order of the Appellate Division was reversed and a new trial was ordered on all counts.[3] *People v. Martinez*, 81 N.Y.2d 843, __N.Y.S.2d__ (1993), Pet. App. 4a, 16a. Relying on its interpretation of this Court's holdings in *United States v. Griffin*, __U.S.__, 112 S.Ct. 466, 470-472 (1991), *Yates v. United States*, 354 U.S. 298, 311-312 (1957), and *Stromberg v. California*, 283 U.S. 359, 367-368 (1931), the New York Court of Appeals held that the delivery of the erroneous presumption charge was not a "trial error," but, rather, was an "illegal theory."[4] Accordingly, the Court of Appeals

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[3]The opinion of the New York Court of Appeals is reproduced in the appendix to this petition at 3a-24a, *infra*. Relying on its own precedent in *People v. Kitching*, 78 N.Y.2d 532, 539 n.2, 599 N.Y.S.2d 231n.2 (1991), *People v. Andujas*, 79 N.Y.2d 113, 118, 580 N.Y.S.2d 719 (1992), the New York Court of Appeals found all three counts "factually interrelated" and thus concluded that reversal of all counts was warranted. *People v. Martinez*, 81 N.Y.2d at 32n.2, __N.Y.S.2d at ___, Pet. App. 8a.

[4]The New York Court of Appeals's own precedent considered in the opinion, although deemed analogous, admittedly did not address precisely

concluded, the error in presenting the presumption was not subject to harmless error analysis. *People v. Martinez*, 81 N.Y.2d at 35, __N.Y.S.2d at ___, Pet. App. 12a-13a.

The Court reasoned that, because there was "some evidence" to support a verdict using the presumption as charged, it was impossible to determine from the jury's general verdict whether the jury convicted defendant under the erroneously submitted "drug factory" presumption theory or the alternative lawful theory of constructive possession without the aid of the permissive presumption. *People v. Martinez*, 81 N.Y.2d at 32, 35, 37, __N.Y.S.2d at ___, Pet. App. 4a, 12a, 15a-16a. In addition, although not reached by the Appellate Division, the Court of Appeals found that the trial court had further erred by not tracking the statute and by expanding the presumption's reach in further defining "close proximity" and "open view." *People v. Martinez*, 81 N.Y.2d at 36, 37, __N.Y.S.2d at ___, Pet. App. 14a-15a.

In contrast to the majority opinion, the three-judge dissent was unable to perceive any distinction between the "drug factory" presumption and an unconstitutional presumption designed to permit a jury to infer criminal intent. *People v. Martinez*, 81 N.Y.2d at 39, __N.Y.S.2d at ___, Pet. App. 18a. Moreover, the dissent argued that, even

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footnote 4 continued. . .
the same issue. *People v. Martinez*, 81 N.Y.2d at 33, __N.Y.S.2d at ___, Pet. App. 9a-10a.

if the "drug factory" presumption was a "theory" or separate ground of criminal liability, it could not, under *Griffin*, be considered an "*illegal* ground" not subject to harmless error analysis. 81 N.Y.2d at 39, __N.Y.S.2d at ___, Pet. App. 19a (emphasis in original).

First, "[u]ncontestably, the *sole* reason that the presumption should not have been charged was because there was insufficient evidence to do so." *People v. Martinez*, 81 N.Y.2d at 39, __N.Y.S.2d at ___, Pet. App. 19a (emphasis in original). Further, the dissent noted that *Griffin* expressly limited the *Stromberg/Yates* automatic reversal rule to only the following cases: those where an alternate theory is presented to the jury urging a conviction based either on an unconstitutional ground (*Stromberg*) or on an illegal ground (*Yates*); or cases where the defendant is convicted of a crime not charged in the indictment (*see People v. Grega*, 72 N.Y.2d 89, 534 N.Y.S.2d 647 [1988]). *People v. Martinez*, 81 N.Y.2d at 41-42, __N.Y.S.2d at __, Pet. App. 22a-23a. Thus, the dissent found that the majority's "ominous precedent" would inappropriately raise any "theory" to the status of an "illegal theory" whenever there is legally insufficient evidence to convict a defendant on that theory yet there is "some lesser quantum" of evidence rendering it "theoretically impossible to determine whether the jury's general verdict was based on that theory." 81 N.Y.2d at 42, __N.Y.S.2d at ___, Pet. App. 23a.

Further, the dissent found it "disquieting" that the majority precluded harmless error analysis here on the ground that it could not be "*conclusively*" demonstrated that the error was not harmless. *People v. Martinez*, 81 N.Y.2d at 42, __N.Y.S.2d at ___, Pet. App. 23a (emphasis in original). The dissent noted that the imposition of a *per se* reversal rule was "divorced from the actual realities of the trial" and, moreover, failed to "attempt to fairly assess the impact of the error on the fact-finding process." 81 N.Y.2d at 42, __N.Y.S.2d at __, Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

The State Court of Appeals Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This case raises significant questions as to the appropriate evaluation of the validity of a general verdict, when a presumption was erroneously charged because there was insufficient evidence to establish the predicate facts upon which the presumption operates. Resolution of this issue hinges on two distinct lines of cases: those evaluating the sufficiency of general verdicts when one specification is unsupported by sufficient evidence (*see United States v. Griffin*, __U.S.__, 112 S.Ct. 466 [1991]; *Turner v. United States*, 396 U.S. 398 [1970]; *cf. Yates v. United States*, 354 U.S. 298 [1957]; *Stromberg v. California*, 283 U.S. 359 [1931]); and

those addressing the appropriateness of applying harmless error analysis to improperly charged presumptions. *See Yates v. Evatt*, __U.S.__, 111 S.Ct. 1884 (1991); *Carella v. California*, 491 U.S. 263 (1989); *Rose v. Clark*, 478 U.S. 570 (1986). Neither line of cases, however, definitively resolves the issue raised here; and, given the prevalence of the general class of presumptions of which the presumption in this case is an example, the Court should grant certiorari and review the issue raised.

The "drug factory" presumption at issue here is a variation of the type of permissive presumption addressed by this Court in *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). In *Ulster County*, this Court examined another New York statutory presumption which permitted a jury, in appropriate circumstances, to infer illegal possession of a firearm by occupants of an automobile from the presence of the firearm in that automobile. *See* New York Penal Law § 265.15(3) (McKinney 1989). In this case, the statutory presumption permitted the jury to infer knowing possession of narcotics by those persons in "close proximity" to the narcotics when the narcotics are found in "open view" in a nonpublic room under circumstances evincing an intent to mix or otherwise prepare the narcotics for sale. *See* New York Penal Law § 220.25(2) (McKinney 1989).

Under New York law, and consistent with the demands of due process, the presumption could only be charged if there was a reasonable view of the evidence that

the predicate facts -- *i. e.*, that the narcotics were in open view -- existed. The error here, as found by both state appellate courts below, was that there was insufficient proof to establish the required predicate facts to warrant even charging the presumption. The state appellate courts split, however, over whether this error required reversal.

The majority and the dissent in the Court of Appeals disagreed, in particular, over whether the analysis and reasoning set forth by this Court in *United States v. Griffin*, 112 S.Ct. at 474, controlled the resolution of this case. This issue alone is deserving of review by this Court.

In *Griffin*, this Court upheld the defendant's conviction for conspiracy in a multiple overt act conspiracy case in which only one of the acts was supported by sufficient evidence. The Court reasoned that a general verdict need not be set aside as long as one of the proper alternative bases is supported by sufficient evidence. As the Court noted, a jury is presumed capable of assessing all of the evidence and rejecting any theory not factually supported by the record. *United States v. Griffin*, 112 S.Ct. at 474. In so concluding, this Court relied upon its earlier precedent in *Turner v. United States*, 396 U.S. at 419, which held that when a jury returns a verdict on an indictment charging several acts in the conjunctive, the verdict may stand if the evidence is sufficient as to any one of the acts charged. In extending *Turner* in *Griffin*, this Court distinguished "legal error," or a mistake about the law, from "insufficiency of proof," which

concerns the weight and factual import of the evidence. *United States v. Griffin*, 112 S.Ct. at 474. On that basis, the Court distinguished two prior precedents -- *Stromberg v. California*, 283 U.S. at 359 and *Yates v. United States*, 354 U.S. at 298 -- in which the Court had held that, when a jury is presented with alternate theories of liability and one of the bases is unconstitutional or illegal, the verdict must be set aside if it is impossible to determine on which basis the verdict rested.

In this case, unlike *Griffin*, there was an actual legal error of constitutional dimension in charging a presumption. Unlike *Stromberg* and *Yates*, however, this "legal error" arose out of the insufficiency of the evidence and not out of principles of law beyond the jurors' understanding. Specifically, the jury was entitled to draw the inference of knowing possession of cocaine, as provided in the presumption and the court's charge, only if the jurors first found the requisite predicate facts; but, as the Appellate Division correctly found, the cocaine recovered from the four-to-five inch space between the wall and the couch was not "in open view," as required by the presumption; and, as also required by the presumption, there were no circumstances indicating the existence of any drug factory -- *i.e.*, there were no scales or other paraphernalia, and the quantity of cocaine that was recovered was of an amount reasonably associated with personal use. *People v. Martinez*, 186 A.D.2d at 152, 587 N.Y.S.2d at 714, Pet. App. 27a. In

short, the evidence was insufficient to establish the predicate facts either beyond a reasonable doubt or even, as a threshold matter, to charge the presumption.

As a result, the jurors could have analyzed the evidence and rejected the presumption as factually insufficient without having to address any legal insufficiency. Thus, the rationale of *Griffin*, and not that of *Stromberg* and *Yates*, suggests that the jury's general verdict in this case was sound, as the dissenting opinion in the Court of Appeals found. *People v. Martinez*, 81 N.Y.2d at 41-42, __N.Y.S.2d at ___, Pet. App. 22a-24a.[5]

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[5]Thus, even if the majority was correct that the error with respect to the presumption was twofold -- *i.e.*, first, that there was insufficient evidence to charge the presumption; and second, that the trial court's charge erroneously expanded the reach of the presumption by deviating from the statutory terms authorizing it -- the combination of errors should not have precluded all review for harmlessness. Viewing these two errors in conjunction, and in light of the evidence and the presumption that jurors are capable of assessing all of the evidence and rejecting any theory not factually supported by the record, it is apparent that neither error was reversible *per se* and therefore the majority's combining them to preclude harmless error analysis was not rational. First, the error which resulted from lack of sufficient evidence could not have contributed to the verdict because it can be presumed that the jury did not rely on a factually insufficient theory. *See United States v. Griffin*, 112 S.Ct. at 474. Second, the court's deviation from the "drug factory" presumption statute in its charge should not have had any effect whatsoever on the determination that the instruction was not subject to harmless error analysis because a presumption need not be accurate in every imaginable case. *See County Court of Ulster County v. Allen*, 442 U.S. at 156, n.14, citing *Leary v. United States*, 395 U.S. 6, 53 (1969).

The majority and dissent below also disagreed as to the related and significant question of whether, under *Griffin*, automatic reversal is required if the erroneously charged presumption is supported by some quantum of evidence. The majority opinion reasoned that there was "some," albeit insufficient, evidence to support a conviction under the trial court's expanded "drug factory" presumption charge and, accordingly, the jury "may have" relied on the presumption. *People v. Martinez*, 81 N.Y.2d at 35, 37, __N.Y.S.2d at ___, Pet. App. 12a-15a. However, as the dissent noted, "[u]ncontestably, the *sole* reason why the drug factory presumption should not have been charged here was that there was insufficient evidence to support it." *People v. Martinez*, 81 N.Y.2d at 39, __N.Y.S.2d at ___, Pet. App. 19a (emphasis in original). Accordingly, the dissent found that the majority's "circular rationale" had "turn[ed] the principle enunciated in *United States v. Griffin* (*supra*) on its head." *People v. Martinez*, 81 N.Y.2d at 42, __N.Y.S.2d at __, Pet. App. 23a.

Indeed, the majority's opinion appears to have disregarded the clear intent of *Griffin*, which expressly rejected the suggestion that it is only when the prosecution presents "*no evidence whatever*" on the erroneous theory that it can be determined that the jury's verdict did not rely on it. *United States v. Griffin*, 112 S.Ct. at 473 (emphasis in original). Refusing to reward the greater failure of proof, this Court noted that that proposition was not only without

foundation in *Turner* and the common law upon which *Turner* is based, but was also full of "practical difficulty." *United States v. Griffin*, 112 S.Ct. at 474.

In fact, in *Turner*, this Court held, without any detailed analysis, that an improperly charged statutory presumption allowing the jury to infer heroin distribution from the absence of appropriate tax stamps from the original package was "irrelevant" to the validity of the conviction. The instruction, even if invalid, was harmless: the jury must have credited the possession evidence which, in itself, had established unlawful distribution. *Turner v. United States*, 396 U.S. at 421; *see People v. Martinez*, 81 N.Y.2d at 40, __N.Y.S.2d at ___, Pet. App. 20a-21a. This holding certainly suggests -- contrary to the reasoning of the majority in the Court of Appeals below, but consistent with that of the dissent -- that the rationale underpinning *Griffin* is equally applicable to the facts of this case.

Moreover, the conclusion that the integrity of the verdict in this case was not compromised by the erroneously charged presumption also gains support from this Court's decisions applying harmless error analysis to other types of presumptions. Indeed, in *County Court of Ulster County v. Allen*, 442 U.S. at 159, this Court acknowledged, although did not decide, that it is not "irrelevant" in analyzing, as here, a purely permissive presumption to see if "there is ample evidence in the record other than the presumption to support a conviction." In fact, this Court has repeatedly held, in

particular, that a harmless error analysis is applicable to unconstitutional *Sandstrom* presumptions. *See, e.g., Yates v. Evatt*, 111 S.Ct. at 1894; *Rose v. Clark*, 478 U.S. at 580; *Carella v. California*, 491 U.S. at 266.

In *Yates v. Evatt*, 111 S.Ct. at 1884, for example, this Court held that determining whether an improper *Sandstrom* presumption undermined the validity of a verdict consists of two steps: first, the reviewing court must determine what evidence the jury actually considered; and, second, the court must weigh the probative force of all the relevant evidence against the probative force of the presumption standing alone. *Yates v. Evatt*, 111 S.Ct. at 1893-1894. Indeed, in concluding that an unconstitutional presumption did not contribute to a verdict, a reviewing court necessarily must make a judgment about the significance of the presumption when measured against the other evidence considered by the jurors independently of the presumption. *See Sullivan v. Louisiana*, __U.S.__, 113 S.Ct. 2078, 2084 (Rehnquist, C.J., concurring); *cf. Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987). Here, under this kind of analysis, the erroneously charged "drug factory" presumption could be found not to have contributed to the verdict, because its effect was minimal in comparison to the overwhelming evidence of defendant's constructive possession.

Of course, in contrast to an improper *Sandstrom* charge, the presumption charged here was more expansive and permitted the jury to draw an inference as to more than

one element. As such, it was more akin to an entire theory of criminal liability, rather than a presumption regarding any one element. Nonetheless, neither a *Sandstrom* presumption nor the one at issue here constitutes the type of "structural error" that totally defies a harmless error analysis. *See Sullivan v. Louisiana*, __U.S. at ___, 113 S.Ct. at 1254, 1264; *Arizona v. Fulminante*, 499 U.S. 279 (1991). As the dissent below aptly noted, the presumption here was, in effect, "not different *in kind*" from an erroneous *Sandstrom*-type of presumption because both are improper evidentiary charges. *People v. Martinez*, 81 N.Y.2d at 38, __N.Y.S.2d at ___, Pet. App. 18a. (emphasis in original). In short, as with the principles underlying *Griffin* and *Turner*, the principles underlying the *Sandstrom* harmless error cases suggest, but do not definitively decide, that the impact of the erroneously charged presumption here was harmless.

Thus, this Court should review the decision below -- which the dissent characterized as an "ominous precedent" (People v. Martinez, 81 N.Y.2d at 42, __N.Y.S.2d at ___, Pet. App. 23a) -- in order to clarify the scope and reach of this Court's prior decisions. In this regard, review by this Court is especially important given the prevalence of presumptions similar to the one in this case in both state and federal law. As this Court has noted, permissive presumptions are common evidentiary devices that are staples of our adversary system of factfinding. *County Court of Ulster County v. Allen*, 442 U.S. at 156. Indeed, the federal penal system employs

a number of statutory and common law presumptions to allow a jury to infer an "ultimate" fact from proof of one or more "basic" facts,[6] and the various states also permit the use at trial of such presumptions.[7]

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[6]*See, e.g., Barnes v. United States*, 412 U.S. 837, 843-844 (1973) (common law presumption permitting jury to infer guilty knowledge from fact of unexplained possession of stolen goods); *Turner v. United States*, 396 U.S. 398, 402 n.2 (1970) (26 U.S.C. § 473[a]) (proof of absence of appropriate taxpaid stamps on packaging is *prima facie* evidence of purchase, possession or distribution of narcotic drugs); *United States v. Gainey*, 380 U.S. 63, 67-70 (1965); *United States v. Romano*, 382 U.S. 136, 137 and n. 4 138, 143 (1965) (26 U.S.C. § 5601[a][4], [b][2]) (proof of presence at site of illegal still is proof of "carrying on" the business of distilling or of being in possession or custody or control of a distillery); *United States v. Callahan*, 434 F.Supp. 1203 (D. Minn. 1977) (18 U.S.C. § 1201[b]) (failure to release kidnap victim within twenty-four hours after seizure creates rebuttable presumption that victim has been transported in interstate or foreign commerce).

[7]*See, e.g., State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11 (1st Dist. 1973) (N.C. Gen. Stat. 90-94[f][3]; 90-95[f][3] [1993]) (possession of more than five grams of marijuana is prima facie evidence of intent to distribute); *People v. Marshall*, 165 Ill. App.3d 968, 521 N.E.2d 526 (1st Dept. 1987); *accord People v. Schaefer*, 133 Ill. App.3d 697, 702, 479 N.E.2d 428, 432 (1985) (common law inference of intent to deliver controlled substance from possession of amount greater than that normally possessed for personal consumption); *State v. Birdwell*, 6 Wash. App. 284, 291, 492 P.2d 249, 254 (Wash. Ct. App. 1972), *cert. denied and appeal dismissed*, 409 U.S. 973 (1970) (Wash. Rev. Code § 69.40.070[5]) (possession of more than 40 grams of cannabis is prima facie evidence of possession with intent to sell); *State v. Hock*, 54 N.J. 526, 257 A.2d 699 (N.J. Sup. Ct. 1969), *cert. denied*, 399 U.S. 930 (1970) (N.J. Stat. Ann. § 2A: 151-41) (presence of firearm in vehicle is presumptive evidence of possession by persons occupying the vehicle); *see generally Statutory Presumption of Possession of Weapon By Occupants of Place or Vehicle*

In sum, this case presents important questions regarding the interpretation and application both of the principles underlying *Griffin* and *Turner* regarding evaluating the sufficiency of a general verdict, and of the principles underlying cases involving the application of harmless error to *Sandstrom* presumptions. Neither line of cases, however, definitively resolves the issue presented here; and review by this Court is thus necessary to clarify and resolve the applicability of the principles underlying both of those lines of cases to the particular facts of this case.

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footnote 7 continued . . .

Where It Was Found, 87 A.L.R.3d 949; *Validity and Construction of Statute Creating Presumption or Inference of Intent to Sell From Possession of Specified Quantity of Illegal Drugs*, 60 A.R.3d 1128.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 21, 1994

APPENDIX

Remittur

Court of Appeals
State of New York

The Hon. Judith S. Kaye, Chief Judge, Presiding

2 No. 255
The People &c.,
Respondent,
v.
Andre Martinez,
Appellant.

The appellant in the above entitled appeal appeared by Philip L. Weinstein, Esq., Legal Aid Society; the respondent appeared by Hon. Richard A. Brown, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is reversed and a new trial ordered. Opinion by Judge Hancock. Chief Judge Kaye and Judges Titone and Smith concur. Judge Levine dissents and votes to affirm in an opinion in which Judges Simons and Bellacosa concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1993.

State of New York
Court of Appeals

2 No. 255

The People &c.,

Respondent,

V.

Andre Martinez,

Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Irma B. Ascher, for appellant.
Nicoletta J. Caferri, for respondent.

Hancock, J.:

Defendant was convicted by a jury of criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]). In submitting the criminal possession count, the trial court instructed the jury that it could find defendant guilty of either actual possession or constructive possession and that it could find that defendant knowingly possessed the drugs by applying the "drug-factory" presumption (*see* Penal Law § 220.25[2]). The jury returned a general verdict of guilty on the criminal possession count without specifying the basis for its finding. On appeal the Appellate Division held that the presumption should not have been charged because the drugs were not in plain view

and there was insufficient evidence to evince an intent to engage in a drug factory operation. That court nevertheless affirmed, applying a harmless error analysis and finding overwhelming evidence to establish defendant's guilt on the basis of constructive possession.

Leave has been granted primarily to address defendant's contention that harmless error analysis was improperly employed where the jury has returned a general verdict and it is thus impossible to determine whether it convicted defendant under an erroneously submitted theory. Under the particular circumstances in this case, we agree with defendant that harmless error analysis was inappropriate. Accordingly, there should be a reversal and a new trial.

I

Defendant was tried together with co-defendant Alphonso Mejie, the lessor of apartment 7B, a one-room apartment with attached kitchen in a building on 88th Street in Queens, where undercover police had purchased cocaine on three occasions: September 13, September 20, and September 29, 1988. Co-defendant Mejie was charged with criminal sale of a controlled substance in connection with the September 13 transaction. The undercover agent who made the September 13 purchase testified that when he was in apartment 7B he observed Mejie weigh the purchased substance on a scale in the kitchen and wrap it in aluminum foil. The package was exchanged for pre-recorded cash.

Another undercover officer testified to making the purchases of cocaine from defendant on September 20 and

29, also from apartment 7B. On the latter occasion, the witness said that he observed, on top of a kitchen cabinet, open tinfoil containing a substance that appeared to be cocaine. A woman who was in the apartment with defendant sealed the substance in the tinfoil and handed it to defendant; defendant, in turn, handed the package to the undercover in exchange for the money.

On September 29, after the drug purchase on that day, the police executed a search warrant for the Mejie apartment, 7B. A search revealed a tinfoil packet of cocaine on the floor in the four-to-five inch space between a couch and the wall. Inside a closet, the police found a one dollar bill and a five dollar bill, both containing some residue of cocaine. Also in a closet, the police recovered $110 of pre-recorded buy money co-mingled with another $850, all secreted in a child's pocketbook. An additional $3,630 in cash was discovered in one of the closets. Both defendant and co-defendant Mejie, as well as two women, were present in apartment 7B when the warrant was executed. In addition to the sale charges, both defendant and co-defendant Mejie were charged and tried for criminal possession of a controlled substance in the third degree -- *i.e.*, possessing a narcotic with intent to sell it.

In charging the jury with respect to the possession charges against both defendants, the trial court stated that possession could be actual possession as when the drugs are found on the defendant's person or in clothing that he is wearing. Alternatively, the court instructed that the possession could be constructive, *i.e.*, possession by a person who, although not in actual physical possession, nonetheless "has both the power and intent to exercise dominion or

control over the controlled substance, either directly or through another person or persons". The court then instructed the jury with respect to the Penal Law § 220.25(2)[1] presumption, as follows:

> When narcotic drugs are found in open view in a private room other than in a public place under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare such controlled substance for sale, each and every person in close proximity to such controlled substance at the time the drug was found is presumed to know of such possession.
>
> The term close proximity does not necessarily mean the same room where the drugs are found, so long as this room is either adjacent to or could be observed from the room that the person is located.
>
> Neither does the term open view necessarily mean the drugs themselves were in plain view or displayed. It is sufficient for the

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[1]Penal Law § 220.25(2), in pertinent part, provides: "The presence of a narcotic drug, narcotic preparation, marijuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found."

> presumption to apply that the drugs were found in a container or package and there was other evidence of preparation of drugs for sales.

The jury convicted defendant of the September 20 and 29 sales, convicted co-defendant Mejie of the September 13 sale and convicted both defendants of criminal possession with intent to sell the drugs found in apartment 7B on execution of the search warrant on September 29.

On appeal, the Appellate Division agreed with defendant that no view of the evidence supported the "drug factory" presumption charge under Penal Law § 220.25(2). The court concluded that the tinfoil packet was not found in plain view since it was on the floor in the four-to-five inch space between the couch and the wall. Moreover, the court held that even if the packet could be considered to have been in plain view, "the evidence does not show 'circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale' (Penal Law § 220.25[2])" (*People v. Martinez*, 186 A.D.2d 151, 152).

Despite its conclusion that the "drug factory" presumption had been erroneously charged, the Appellate Division unanimously held that a reversal was not required on the basis of harmless error. It reasoned:

> The trial court instructed the jury on three theories of possession: actual possession, constructive possession, and the drug factory presumption of possession. Since there is overwhelming evidence that the defendant

> exercised "dominion or control" over the property by a sufficient level of control over the area in which the contraband was found, the error is harmless beyond a reasonable doubt. The People established that the defendant sold cocaine from that apartment on two different occasions, including a sale just minutes before the police searched the apartment and arrested the defendant (*id.* at 153 [citations omitted]).

The Appellate Division rejected defendant's other contentions including his argument for a reversal because of an unbalanced identification charge. It affirmed defendant's convictions on all counts. We conclude that because of the defect in the conviction on the criminal possession count, there must be a reversal and a new trial.[2] We do not address defendant's other contentions of error.

II

It is an established rule of Supreme Court jurisprudence that a general verdict of guilt must be set aside where the jurors in reaching their verdict may have relied on an illegal ground or on an alternative legal ground and there is no way of knowing which ground they chose (*see, e.g., Griffin v. United States*, __U.S.__, 112 S.Ct. 466, 470-472;

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[2]Because the criminal possession count and the sale counts are factually interrelated, there should be a reversal and a new trial on both the sale and possession counts (*see, People v. Andujas*, 79 N.Y.2d 113, 118 n. *; *People v. Kitching*, 78 N.Y.2d 532, 539 n. 2).

Yates v. United States, 354 U.S. 298, 311-312; *Stromberg v. California*, 283 U.S. 359, 367-368). Thus, the Supreme Court has consistently vacated general verdicts where one of the choices afforded to the jury was to find guilt on an unconstitutional theory and has rejected the contention that the verdict should be upheld because the factfinder must have based it on an alternative constitutional ground (*see, e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-571; *Street v. New York*, 394 U.S. 576, 585-590; *Williams v. North Carolina*, 317 U.S. 287, 291-292). In *Yates*, the Supreme Court applied this same rationale and set aside a general verdict where one of the bases on which guilt could have been predicated, although not unconstitutional, was nevertheless illegal (*see, Yates, supra*, at 311-312 [one statutory ground on which jury could have convicted under court's instructions was time-barred and, therefore, unlawful]). Recently, in *Griffin (supra)*, the Supreme Court reaffirmed the *Stromberg/Yates* rule that there must be a reversal if a general verdict of guilty may have been based on an unlawful theory. The *Griffin* court upheld the conviction, however, drawing a distinction between a case where one of the possible grounds for a verdict was illegal as in *Yates* or unconstitutional as in *Stromberg* and the situation where, as in *Griffin*, one of the jury's charged options was not supported by sufficient evidence. The Court noted that, as opposed to when the jurors have been given the choice of an illegal option, when they "have been left the option of relying upon a factually inadequate theory [they] are well equipped to analyze the evidence" (*Griffin, supra*, at 474).

Although our Court has never applied the precise theory adopted by the Supreme Court in *Yates* and *Stromberg*, we have in analogous situations set aside a verdict

where there was a possibility that it was based on an illegal ground which had support in the record. Thus, in *People v. Roberts* (72 N.Y.2d 489) where a jury verdict of manslaughter in the first degree could have been based on evidence of strangulation adduced at trial -- a theory not presented to the grand jury and inconsistent with the allegations in the indictment -- we reversed the conviction since a verdict based on strangulation would have violated defendant's constitutional and statutory right to be prosecuted in accordance with the indictment (*see, id.,* at 497-500; *cf, People v. Grega,* 72 N.Y.2d 489, 496-497 [the companion case decided with *People v. Roberts, supra*]). Similarly, in *People v. Kaminski* (58 N.Y.2d 886), we held that sodomy convictions could not stand where the indictment charged forcible compulsion *only* by means of physical force but where the court erroneously charged that the jury could convict if it found compulsion either from physical force *or* from threats placing the victim in fear of death or physical injury. *People v. Grega (supra)* illustrates the opposite case. There, the indictment charged defendant with rape and sodomy committed through forcible compulsion consisting of physical force; it made no mention of forcible compulsion by express or implied threats. But the trial court, as in *Kaminski,* erroneously charged the jury that compulsion could be established by proof of physical force *or* by proof of express or implied threats. The record showed, however, that the *only evidence* of compulsion adduced at trial was that caused by physical force; thus the proof did not vary from the allegations in the indictment. We, therefore, reinstated the jury verdict, distinguishing *Kaminski* in view of the absence of evidence of express or implied threats and noting that if there *had been* such evidence, defendant's right to be tried only for indicted crimes might well have been violated

(*see, Grega, supra,* at 496).

III

In the case at bar, the Appellate Division held that the jury's general verdict was invalid since it could not have been known if the result was predicated on the erroneous "drug factory" presumption or on the lawful alternative theory of constructive possession without the aid of the presumption. We believe that this conclusion is compelled under the rationale of the Supreme Court's decisions in *Stromberg* and *Yates* and our holdings in *Roberts* and *Kaminski*. The Appellate Division, nevertheless, applied a harmless error analysis and affirmed. Inasmuch as the jury's verdict may have been predicated on an illegal theory[3] and, therefore, subject to vacatur under *Stromberg/Yates*, the

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[3]Contrary to the dissent (dissenting opn, at 3-4), the submission of the "drug factory" presumption as a basis on which the jury could have found defendant guilty gave the jury the choice of convicting defendant based upon an erroneously charged legal theory which should never have been in the case. The trial court committed two errors. First, as the Appellate Division properly held, Penal Law § 220.25(2) should not have been charged *at all* since, *inter alia*, the drugs were not in "open view" or found "under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare [the drugs] for sale." Additionally, as discussed below in Part IV, the presumption as charged by the court did not track the statute but went substantially beyond it and would have permitted the jurors to conclude that the requirements of the statute for finding that defendant was in knowing possession had been met: *i.e.*, that the drugs were found in "open view" and in "close proximity" to defendant under circumstances evincing an intent to prepare them for sale. Thus, it is the unusual combination of these two errors that made it possible for the jury to convict on an erroneous theory and brings the case within the *Yates/Stromberg* rule.

question is whether the Appellate Division correctly sustained the conviction by reviewing the record and finding "overwhelming evidence that defendant exercised 'dominion or control' over the property" (*Martinez, supra,* at 152-153) and holding the error harmless beyond a reasonable doubt.

We conclude that the doctrine of harmless error was improperly applied. The Appellate Division was not presented with the problem of evaluating a trial error and the likelihood that it may have contributed to a result known to have been reached by the jury (*see, e.g., People v. Crimmins,* 36 N.Y.2d 230, 237-242; *Chapman v. California*, 386 U.S. 18). Here, the result reached by the jury was unknown; *i.e.*, whether its verdict was predicated on the illegally charged presumption or on a finding of constructive possession irrespective of the presumption. The unknown aspect of the verdict involved the identity and legality of the theory that the jury chose for its verdict, not the tainting effect of some trial error on a known result (*compare, People v. Smalls*, 55 N.Y.2d 407, 416-417).[4] Where it is impossible

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[4]The People's and the dissent's (dissenting opn, at 2-3) reliance on *People v. McGee,* the companion case to *People v. Smalls* (55 N.Y.2d 407), is misplaced. In *McGee*, there was no question about the result the jury had reached, *i.e.*, that the defendant was guilty of intending to commit robbery, the predicate felony underlying the felony murder charge. The only question was whether the trial court's erroneous jury charge on presuming intent (*see, Sandstromm v. Montana*, 442 U.S. 510) required reversal. The Court merely concluded that because *McGee* did "not involve a trial in which defendant's intent was made a vital issue to be resolved by the jury, on conflicting evidence", harmless error analysis was applicable (*Smalls, supra,* at 417). Here, by contrast, the theory relied on by the jury, which was vital to its conclusion, was unknown. Thus, harmless error analysis is not applicable.

for a reviewing court to determine whether the guilty verdict was founded on an illegal theory, it may not review the evidence under a harmless error analysis and, in effect, assume the jury's fact-finding function by concluding that the jury must have reached its result on some alternative legal ground (*see, People v. Diaz*, 19 N.Y.2d 547, 549-550 [reversing Appellate Division's application of harmless error where trial court incorrectly failed to charge that testimony of accomplice required corroboration]; *People v. Kelly*, 302 N.Y. 512, 517-518; *see also, People v. Gallagher*, 69 N.Y.2d 525, 530; *People v. Minarich*, 46 N.Y.2d 970, 971). Indeed, the Supreme Court in *Yates* specifically rejected a harmless error analysis (*see, Yates, supra*, at 311-312; *see also, Griffin, supra*, at 474 [noting that when "jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error"]). Similarly, in *People v. Kelly* (302 N.Y. 512, *supra*), a case where the trial court delivered both a correct and an incorrect statement of the insanity defense, our Court refused to treat the error as insubstantial, observing:

> It is urged upon us * * * that * * * we should assume that the jurors -- each of the twelve of them -- followed the court when it was correct and disregarded the charge when it was incorrect * * * [that they] had the wit and ability, with unanimity, to adopt the right one and reject the wrong one. We think the statement of the thought contains its refutation (*id.*, at 517).

IV

The People, however, advance an argument for upholding the conviction aside from the Appellate Division's application of harmless error. The argument focuses on the *Stromberg/Yates* rule and the holding in *Griffin (supra)* that a verdict may be upheld when the jurors have been left the option of relying on a *factually inadequate* theory as opposed to one that is *legally inadequate (Griffin, supra,* at 474). Relying principally on *People v. Grega (supra,* at 496-497), in addition to *Griffin*, they contend that here, as in *Grega*, there was *insufficient evidence* to support the verdict on the erroneous theory and that, therefore, it can be concluded that the jury must have based its verdict on a theory for which there was *sufficient evidence.* Thus, they would distinguish *Roberts, Kaminski, Stromberg* and *Yates* where the records contained sufficient evidence on which the jurors could have reached unlawful verdicts.

The argument is not persuasive since *Grega* and *Griffin* are not in point; for, under the improper "drug factory" presumption charge as given by the court here, there *was evidence* to support a verdict on that erroneous theory. Although a requirement for charging the presumption is that the drug be "*in open view* in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance" (Penal Law § 220.25[2] [emphasis added]), the charge, in effect, nullified that requirement. The trial court instructed the jury that "the term open view [does not] necessarily mean the drugs themselves were in plain view or displayed". Thus, the court's expanded charge permitted the jury to conclude that drugs found in the space

between the couch and the wall would satisfy the statute. Moreover, as to the statutory requirement of "close proximity", the trial court's charge made the presumption applicable to anyone present in apartment 7B when the warrant was executed. The court told the jury that the "close proximity *does not necessarily mean the same room where the drugs are found*, so long as this room is either adjacent to or could be observed from the room that the person is located" (emphasis added).

Finally, there was nothing the charge restricting the evidence of observations or activities -- either as to nature or time of occurrence -- that the jury could consider as constituting "circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare such controlled substance for sale". The jury could well have considered as relevant on this issue the evidence of the three drug purchases on September 13, 20 and 29, including the testimony concerning the scales observed in the kitchen on September 13 and the open tinfoil containing what proved to be cocaine observed on a kitchen cabinet at the time of the September 29 purchase. Taking this proof of past activities together with the evidence of the large sums of cash and the additional drugs found in apartment 7B on execution of the search warrant, the jury could have been satisfied that there was enough to evince an intent to operate a "drug factory" under the interpretation of the statute given in the court's charge. Thus, like *Roberts*, *Stromberg*, and *Yates*, and unlike *Grega* and *Griffin*, since there was some evidence to support a verdict on the erroneous basis, there must be a new trial.

In sum, we agree with the Appellate Division that the evidence did not warrant a "drug factory" charge under the

statute. But given the court's expanded charge on the presumption, there is no way of concluding, short of speculation, that the jury did not rely on it. As the Supreme Court observed in *Bollenbach v. United States* (326 U.S. 607), an analogous case where the trial court had mistakenly charged a presumption:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be (*id.*, at 615).

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

People v. Martinez

No. 255

Levine, J. (dissenting):

I respectfully dissent. As I read the majority's opinion, its rationale for reversal is as follows: (1) it holds that charging the jury on the "drug factory" presumption (Penal Law § 220.25[2]) of knowing possession of a controlled substance constituted the submission of an "illegal" "ground" or "theory" (slip opn pp 6-9) of criminal liability: (2) relying upon three Supreme Court cases (*Griffin v. United States*, __U.S.__, 112 S.Ct. 466; *Yates v. United States*, 354 U.S. 298; and *Stromberg v. California*, 283 U.S. 359), the opinion then holds that submitting such an illegal theory to the jury was reversible error; (3) finally, the opinion concludes that the improper submission of such an illegal theory is not subject to harmless error analysis, because the jury returned a general verdict of guilty of drug possession and there is no way of conclusively determining whether it applied the drug factory presumption in reaching that verdict. There are fatal infirmities in each of the foregoing three propositions upon which the majority's decision rests.

I

In my view, the drug factory presumption, like any other statutory or, for that matter, common-law presumption,

is not a *theory* or a *ground* of criminal liability. With respect to all of such presumptions the court merely instructs the jury that it may (or may not) apply the presumption in order to infer the existence of one or more of the factual elements of the crime charged. The presumption involved in this case, designed to permit a jury to infer the knowing possession of a controlled substance from certain facts in evidence, is not different *in kind* from the presumption (designed to permit the jury to infer criminal intent) erroneously charged in *People v. McGee*, the companion case to *People v. Smalls* (55 N.Y.2d 407, 417). Yet, in *People v. McGee*, this Court held that a *constitutional* error in charging the presumption was subject to harmless error analysis (*id.*). In *McGee*, this Court then analyzed the evidence and whether the defendant's intent "was made a vital issue to be resolved by the jury," and concluded that there was "no reasonable possibility that the error might have affected the jury's determination of [defendant's] guilt and that the error was therefore harmless beyond a reasonable doubt" (*id.*). I am unable to perceive any distinction between the erroneous charging of the drug factory presumption here and the erroneous charging in *People v. McGee* that "a person is presumed to intend the natural consequences of his acts" (*id.*, at 416). In *McGee*, just as here, "the result reached by the jury was unknown i.e., whether its verdict was predicated on the illegal as charged presumption or on a finding of [guilt] irrespective of the presumption" (slip opn p 10). Therefore, since we are dealing with an improper evidentiary charge rather than a theory or ground of criminal liability defining the crime itself, clearly harmless error analysis applies (*People v. McGee, supra*).

II

Even if the drug factory presumption constituted a theory or ground of criminal liability, it would not, under *Griffin v. United States (supra)* and other Supreme Court decisions, be considered an *illegal* ground or theory in this case. Uncontestably, the *sole* reason why the drug factory presumption should not have been charged here was that there was insufficient evidence to support it, i.e., the drugs here were not found "in open view * * * under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance" (Penal Law § 220.25[2]). Instead, the drugs were concealed on the floor behind a couch. *Griffin* makes clear beyond peradventure that the submission of one possible basis for criminal liability in a case for which there was insufficient evidence to support a conviction is *not* a ground for reversal:

> Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates*, but *merely unsupported by sufficient evidence.* If such invalidation on evidentiary grounds were appropriate, it is hard to see how it could be limited to those alternative bases of conviction that constitute separate legal grounds; surely that underlying principle would apply equally, for example, to an indictment charging murder by shooting or drowning, where the evidence of drowning proves inadequate (*see, Schad v. Arizona*, 501 U.S. at ___, 112 S.Ct. at 2496-

2497 (*Griffin v. United States, supra*, 112 S.Ct. at 472 [emphasis supplied]).

Griffin expressly limited the holdings of *Yates v. United States (supra)* and *Stromberg v. California (supra)* to errors in submitting alternative theories or grounds for establishing the commission of the crime charged where conviction on that theory would be prohibited as unconstitutional, or illegal as, e.g., barred by the Statute of Limitations (*Griffin v. United States, supra,* 112 S.Ct. at 472-473).

Indeed, the Court in *Griffin* cited with approval *Turner v. United States* (396 U.S. 398) as properly rejecting "a claim that the evidence was insufficient to support a general guilty verdict under a one-count indictment charging the defendant with knowingly purchasing, possessing, dispensing, and distributing heroin not in or from the original stamped package, in violation of 26 U.S.C. section 4704(a) (1964 ed). We held [in *Turner v. United States*] that the conviction would have to be sustained if there was sufficient evidence of distribution *alone*" (*Griffin v. United States, supra*, 112 S.Ct. at 472-473 [emphasis in the original]). Our case law similarly upholds a general verdict under the same circumstances (*see, People v. Charles*, 61 N.Y.2d 321, 327; *People v. Clougher,* 246 N.Y. 106, 112; *People v. Nicholas*, 35 A.D.2d 18, 20 [Cooke, J.]).

It is further noteworthy that the Supreme Court in *Turner v. United States (supra)* applied harmless error analysis to the additional claim that it was error to charge the statutory *presumption* of criminal distribution from the defendant's possession of the heroin:

> So, too, the instruction on the presumption is beside the point, since even if invalid, it was harmless error; the jury must have believed the possession evidence which in itself established a distribution barred by the statute (396 U.S. at 421).

III

Even if the drug factory presumption constituted an illegal theory or ground of criminal liability here, the submission of which to the jury was error, it would nonetheless be subject to harmless error analysis. This is the explicit teaching of *People v. Grega* (72 N.Y.2d 489). *Grega* did involve the submission of an illegal theory of liability for rape in the first degree, i.e., by means of forcible compulsion by threat (Penal Law § 130.00[8][b]). Because the indictment charged the defendant only with rape by forcible compulsion consisting of the use of physical force (*see*, Penal Law § 130.00[8][a]), the submission of the alternative theory of compulsion by threat was held to violate Article I, section 6 of the State Constitution (*People v. Grega, supra*, 72 N.Y.2d at 495). There having been no evidence in the case of the use of any threat, however, we held that the *constitutional* error in *Grega* was harmless and did not require reversal.

> While the trial court should not have charged both statutory definitions of forcible compulsion, but instead should have tailored its instructions to the case before it, on this record we conclude that the additional portion of the charge had no potential for prejudicing defendant, and thus was harmless error (*id.*, at

497).

The majority states that *Grega* is distinguishable, however, because the trial court erroneously deviated from the statutory language of the drug factory presumption of Penal Law § 220.25(2), by relaxing the statutory requirements that the drugs be in "open view" and in "close proximity" to defendant, and by not making clear that the necessary elements for applying the presumption must be present at the time the drugs were found. The majority posits the possibility that this error in instruction permitted the jury to apply the presumption on the basis of the drugs found hidden behind the couch during the raid on September 29, and the drug sale preparation activities observed on previous occasions. *Grega* is then distinguished because here there was at least some evidence which the jury might possibly have relied upon to apply the drug factory presumption (as charged) to the case (slip opn p 12-13). The majority concludes that, because it is "*impossible*" (emphasis supplied) to determine whether or not the jury applied the illegal theory of the drug factory presumption, harmless error analysis is precluded (slip opn pp 10-11).

There are several major flaws in the majority's analysis. First, the error, if any, in the way the drug factory presumption was charged surely did not constitute the submission of an *illegal* theory of criminal liability in the *Griffin v. United States (supra)* sense, or in the sense employed in any of the other cases relied upon by the majority, i.e., a theory of liability leading to an unconstitutional conviction (*Stromberg v. California, supra*), a conviction barred by the Statute of Limitations (*Yates v. United States, supra*) or a conviction of a crime for which the

defendant had not been indicted (*People v. Grega, supra*). The trial court's deviation from the statutory terms of the drug factory presumption clearly appears to be nothing more than a common variety of error in instructions, such as in defining the elements of a crime or how the jury may use inferences or presumptions from the evidence. Raising this kind of error in instructions to the status of the submission of an illegal theory of criminal liability turns the principle enunciated in *Griffin v. United States (supra)* on its head, and is an ominous precedent.

What is even more disquieting is the majority's circular rationale for precluding harmless error analysis in this case. Under it, a "theory" of liability, whether in the form of a statutory presumption or of one of the alternative bases for conviction of the crime charged, as alleged in the accusatory instrument, becomes an *illegal* theory, not subject to harmless error analysis, whenever there is legally insufficient evidence to convict on that "theory", yet there is some lesser quantum of evidence rendering it theoretically impossible to determine whether the jury's general verdict of guilty was based upon that theory. In essence, then, the majority's rationale is that harmless error analysis is precluded here because it cannot be *conclusively* demonstrated that the error in submitting the drug factory presumption *was not harmful*. The majority has, thus, imposed a *per se* rule divorced from the actual realities of the trial or any attempt fairly to assess the impact of the error on the fact-finding process in the case. The result here is not only to overturn defendant's conviction of drug possession arising out of the September 29, 1988 raid, but to reverse two solidly proven drug sale convictions, one occurring nine days before the raid.

Applying the appropriate harmless error analysis for the nonconstitutional error (*see, People v. Crimmins,* 36 N.Y.2d 230, 241-242) in charging the drug factory presumption, I would affirm defendant's drug possession conviction, and with it the convictions on the drug sales. The evidence of defendant's dominion and control over drugs in his co-defendant's apartment, thereby establishing his constructive possession without the aid of the drug factory presumption, was indeed overwhelming, as found by the Appellate Division and not disputed by the majority here. The trial court, in charging the drug factory presumption, clearly and unequivocally stated that the presumption only applies when "drugs are found * * * under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare such controlled substance for sale * * * *at the time the drug was found*" (emphasis supplied). Thus, there was no "significant probability" that, but for the error in charging the drug factory presumption, the jury would have acquitted defendant of criminal possession of the controlled substance found in the apartment on September 29 (*People v. Crimmins, supra,* 36 N.Y.2d at 242). Accordingly, I vote to affirm the order of the Appellate Division in all respects.

* * * * * * * * * * * * * * * * * * * *

Order reversed and a new trial ordered. Opinion by Judge Hancock. Chief Judge Kaye and Judges Titone and Smith concur. Judge Levine dissents and votes to affirm in an opinion in which Judge Simons and Bellacosa concur.

Decided December 21, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Argued - June 29, 1992

___A.D.2d___

WILLIAM C. THOMPSON, J.P.
THOMAS R. SULLIVAN
CORNELIOUS J. O'BRIEN
FRED T. SANTUCCI, JJ.

90-05405

The People, etc., respondent,
v. Andre Martinez, appellant.
(Ind. No. 11944/88)

DECISION &
ORDER

Philip L. Weinstein, New York, N.Y. (Ronald Alfano and Irma Ascher of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Emil Bricker of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Linakis, J.), rendered April 9, 1990, convicting him of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

On September 20, 1988, inside Apartment 7B of 148-28 88th Avenue in Queens, an undercover police officer purchased 1/8 ounce of cocaine from the defendant and another individual. On September 29, 1988, at the same address, the defendant and another individual again sold the undercover officer 1/8 ounce of cocaine. Immediately after this sale, the police, armed with a no-knock warrant, forcibly entered and searched the apartment. The police found a tinfoil packet containing 1/8 ounce of cocaine on the living room floor in a four-to-five inch space between the couch and the wall. In a closed closet, the police found a one-dollar bill and a five-dollar bill which contained very small amounts of cocaine. Also found secreted inside various closets was a total of $4,590, $110 of which was the prerecorded money from the sale made immediately before the search. The police arrested the defendant and three other adults found inside the apartment. The defendant was convicted of two counts of criminal sale of a controlled substance in the third degree for the September 20th and September 29th sales and of criminal possession of a controlled substance in the third degree for the cocaine found inside the apartment.

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The defendant contends that with regard to the count of criminal possession of a controlled substance in the third degree, the court improperly charged the jury on the so-called "drug-factory" presumption (*see*, Penal Law § 220.25[2]) since the cocaine was not found in plain view in the living room and because there was no evidence of a drug factory in the apartment. We agree. The tinfoil packet, which contained 1/8 ounce of cocaine, was not found in plain view since it was on the floor in a four-to-five inch space between the couch and the wall (*see generally, People v. Headley*, 143 A.D.2d 937, *aff'd* 74 N.Y.2d 858; *People v. Rodriguez*, 104 A.D.2d 832; *cf., People v. Frazier*, 138 A.D.2d 401). In any event, even if this tinfoil packet could be considered to have been in plain view, the evidence does not show "circumstances evincing an intent to unlawfully mix, compound, package, or otherwise prepare for sale" (Penal Law § 220.25[2]) the narcotics since only 1/8 ounce of cocaine (plus some residue on the one-dollar bill and five-dollar bill) were found in the apartment and no scales or other drug paraphernalia were found (*cf., People v. McCall*, 137 A.D.2d 561; *People v. Tirado*, 38 N.Y.2d 955; *People v. Plower*, 176 A.D.2d 214). Indeed, the amount of cocaine present in the apartment was a quantity reasonably associated with personal use *(see, People v. Plower, supra)*.

Although it was improper for the trial court to deliver the "drug factory" presumption charge because no view of the evidence supported this charge, the error does not require reversal of the conviction of criminal possession of a controlled substance in the third degree. The trial court

instructed the jury on three theories of possession: actual possession, constructive possession, and the drug factory presumption of possession. Since there is overwhelming evidence that the defendant exercised "dominion or control" over the property by a sufficient level of control over the area in which the contraband was found (*see, People v. Manini*, __N.Y.2d__ [March 31, 1992]; Penal Law § 10.00[8]), the error is harmless beyond a reasonable doubt. The People established that the defendant sold cocaine from that apartment on two different occasions, including a sale just minutes before the police searched the apartment and arrested the defendant (*cf., People v. Pearson*, 75 N.Y.2d 1001 [where there was no proof that the defendant was involved in any drug selling or other operation being conducted out of the location searched]).

The defendant also contends that the trial court's identification charge was unbalanced in that it delivered those portions of the Criminal Jury Instructions (1 CJI [NY] 10.01; hereinafter CJI) charge that supported the People's case and omitted those portions of the CJI charge favorable to the defense. The court delivered an expanded identification charge but omitted that portion of the CJI charge concerning descriptions of the defendant given to the police shortly after the commission of the crime (*see*, 1 CJI [NY] 10.01, at 592). Although it would have been preferable for the trial court to have charged this portion of the CJI, the omission does not warrant reversal (*see generally, People v Whalen*, 59 N.Y.2d 273).

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The trial court erred in refusing to exclude from evidence the defendant's statement, made at the time of his arrest, that he lived at apartment 7B, since the People failed to give timely notice pursuant to C.P.L. § 710.30(3) of their intention to use that statement at the trial (*see, People v. Hester,* 161 A.D.2d 665; *People v. Antonio,* 86 A.D.2d 614). However, the error does not warrant reversal since it was clearly established by four witnesses that the defendant resided at a different address with his wife and children.

We have considered the defendant's remaining contentions and find that they are unpreserved for appellate review, without merit, or do not warrant reversal of the judgment of conviction.

THOMPSON, J.P., SULLIVAN, O'BRIEN and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

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COURT'S CHARGE

A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses a narcotic drug with intent to sell it.

Let me define some terms for you.

Possess means to have physical possession or to otherwise exercise dominion or control over tangible property.

Possession of a controlled substance may be actual physical possession or constructive possession. Possession is actual physical possession when the controlled substance is found on the person of a defendant, whether in his hands, on his body, or in the clothing he is wearing.

A person who is not in actual physical possession, but who knowingly has both the power and intent to exercise dominion or control over the controlled substance, either directly or through another person or persons is in constructive possession of such drug.

In other words, possession is constructive when the controlled substance is found in a place or thing or on a person over which he had dominion or control and it is established that the defendant retained the power and authority to do whatever he wanted with the controlled substance, whether to use it himself or otherwise dispose of it as he intended, meaning not to relinquish control over the substance nor to abandon.

Thus, the defendant constructively possesses a controlled substance when he alone or jointly with another or others has such dominion or control over the drug that it remains available for his personal use or disposition in the place where it is stored, secreted, or concealed.

Possession of the property must be knowing possession. That is, the alleged possessor must be aware of his possession of the property.

When narcotic drugs are found in open view in a private room other than in a public place under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare such controlled substance for sale, each and every person in close proximity to such controlled substance at the time the drug was found is presumed to know of such possession.

The term close proximity does not necessarily mean the same room where the drugs are found, so long as this room is either adjacent to or could be observed from the room that the person is located.

Neither does the term open view necessarily mean the drugs themselves were in plain view or displayed. It is sufficient for the presumption to apply that the drugs were found in a container or package and there was other evidence of preparation of drugs for sales.

However, it must be noted that this presumption is not conclusive, but permissive in nature and may be rejected by you. It does not shift the burden of proof. A defendant is not required to prove or disprove anything.

The burden of proving a defendant's guilt remains at all times upon the People and must be proven beyond a reasonable doubt.

In determining whether a defendant possessed the drugs, you may consider the following:

If the controlled substance is found on the premises of which a defendant is the owner or lessee, such factor may be considered as some indication that he possessed the drugs.

Also, as to whether a defendant exercised dominion or control of the premises and, thus, had possession of the drugs, you may consider whether he resided in the apartment or he frequented or visited the apartment on a regular basis.

A person unlawfully possesses a narcotic drug when he has no legal right to possess that narcotic drug.

And I charge you as a matter of law that cocaine is a narcotic drug and a controlled substance, and that it is unlawful to possess cocaine.

According to law, a person intends to sell cocaine when his conscious aim or objective is to sell such narcotic drug.

I have already defined acting in concert.

What a defendant intends is, of course, an operation of his mind. Therefore, in order to assist you in determining what a defendant may have intended at the time of the commission of the alleged crime, you are permitted to

consider the defendant's alleged action, conduct and any verbal statements made before, during and even after the commission of the alleged crime.

In order for you to find each defendant guilty of the crime of criminal possession of a controlled substance in the third degree, the People are required to prove each of the following elements beyond a reasonable doubt as to each defendant:

One, that on or about September 29th, 1988, in the County of Queens, the defendants each aiding the other possessed a certain item.

Two that what the defendants possessed was in fact cocaine.

Three, that the defendants each aiding the other knowingly and unlawfully possessed such cocaine.

And, four, that the defendants each aiding the other knowingly and unlawfully possessed such cocaine with intent to sell it.

Therefore, if you find that the People have proved each and every element as explained beyond a reasonable doubt as to each defendant, then you must find that defendant guilty of the crime of criminal possession of a controlled substance in the third degree.

On the other hand, if you find that the People have failed to prove any one or more of the elements just explained beyond a reasonable doubt as to either or both

defendants, then your verdict must be not guilty of criminal possession of a controlled substance in the third degree as to that defendant or the defendants.